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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 55

AMERICAN AIRLINES, INC., PETITIONER

v.

NORTH AMERICAN AIRLINES, INC. AND CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD[1]

OPINIONS BELOW

The opinion of the Court of Appeals (R. 56–57) is reported at 235 F. 2d 863. The Board's opinion and order (R. 23–34, 40–52) and the dissenting opinion of Member Adams (R. 34–40) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 57), and a petition for rehearing was denied on September 18, 1956 (R. 58). The petition for a writ of certiorari was filed on De-

[1] Although the Civil Aeronautics Board did not file a petition for certiorari, it is of the view that the decision below is erroneous.

cember 17, 1956, and was granted on January 28, 1957 (R. 59). The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTION PRESENTED[2]

Whether the Board made an "allowable judgment in its choice of the remedy" (*Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612) when, upon finding that respondent's use of the trade name "North American Airlines" caused substantial public confusion between it and petitioner "American Airlines" in violation of Section 411 of the Civil Aeronautics Act, it prohibited respondent from using any name containing the word "American."

STATUTE INVOLVED

The Civil Aeronautics Act, Sec. 411, 52 Stat. 1003, as amended, 66 Stat. 628, 49 U. S. C. 491, provides as follows:

> SEC. 411. The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier,

[2] See footnote 6, *infra*.

foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

STATEMENT

Respondent North American Airlines, Inc., was incorporated under the name "Twentieth Century Airlines, Inc.," on May 4, 1946, and on July 22, 1947, received from the Civil Aeronautics Board a Letter of Registration authorizing it to engage in air transportation as a large irregular carrier (R. 1, 4). Commencing in April 1951, it conducted its operations under the names "North American Airlines" or "North American," and almost a year later, on March 3, 1952, its articles of incorporation were amended by changing its name to "North American Airlines, Inc." (R. 4). On March 11, 1952, respondent requested the Board to reissue its Letter of Registration in the name of North American.[3]

In August 1952, the Board's Economic Regulations were amended by the addition of Section 291.28 (14 C. F. R. 291.28), which required that registered ir-

[3] Respondent was one of the original members of a group known as the North American Combine, which also included three other registered irregular carriers, a promotional company, and the individuals controlling the companies. The group took its name from respondent North American Airlines. The original carrier members' operating authority has been revoked by the Board. *North American Airlines* v. *Civil Aeronautics Board*, 240 F. 2d 867 (C. A. D. C.), certiorari denied, 353 U. S. 941. This development, as well as the presently known operations of the members of the combine, were called to the Court's attention in a memorandum filed by the Board in August 1957, in which the possible mootness of this case was discussed. We adhere to our position expressed in the memorandum.

regular carriers must conduct their operations under the names in which their letters of registration were issued unless prior Board approval was obtained for the use of another name. Accordingly, respondent filed with the Board an application which, in pertinent part, requested Board approval of its use of the name "North American Airlines, Inc." (R. 2). Petitioner American Airlines[4] filed a memorandum in opposition, urging, *inter alia,* that such use of the name "North American" would constitute unfair competition in violation of Section 411 of the Civil Aeronautics Act (R. 2).

On January 28, 1953, the Board issued an order deferring action on respondent's application, and instituting an investigation to determine whether, by engaging in air transportation under the names "North American Airlines, Inc.," "North American Airlines," or "North American," respondent was or had been engaging in activities and practices forbidden by Section 411 (R. 1–4). Petitioner was permitted to intervene in the proceeding (R. 9).

On November 4, 1953, following extensive hearings, the Board found that there existed substantial public confusion between petitioner and respondent. This confusion, it found, had resulted from respondent's use of the names "North American Airlines, Inc.,"

[4] Petitioner was incorporated under the laws of Delaware on April 11, 1934, and has engaged in air transportation of persons, property, and mail since that time. It holds certificates of public convenience and necessity to engage in regularly scheduled air transportation between points also served by respondent. It has registered the name "American Airlines" under the Federal Trademark Act (R. 4).

"North American Airlines" and "North American," and from the similarity of those names to the words "American" and "American Airlines" as used by petitioner (R. 24). It concluded (R. 23, 31, 33) that respondent's use of the names "North American" or any combination of the word "American" constituted "an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act," and that prohibition of respondent's use of such names was necessary to prevent "public confusion between air carriers operating between the same cities." Accordingly, in order that "the public should be protected from the effects of the confusion * * * by eliminating what we find to be the cause of such confusion" (R. 31–32), the Board ordered respondent, its successors, assignees, agents, etc., to "cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any other name which includes the word American" (R. 51–52).

On petition for review, the court below set aside the Board's order. *North American Airlines* v. *Civil Aeronautics Board*, 228 F. 2d 432. This Court, on April 23, 1956, reversed the judgment of the Court of Appeals, holding (1) that the Board properly had concluded that the proceeding was in the public interest, and (2) that the Board may prohibit, as an unfair or deceptive practice or an unfair method of competition under Section 411, the use by an air carrier of a confusingly similar trade name. *American Airlines* v. *North American Airlines*, 351 U. S. 79. However, because the Court of Appeals had not "decided

whether the Board's findings were supported by substantial evidence on the record as a whole," the case was remanded to the Court of Appeals for that determination. 351 U. S. at 86.

About a month later, in May 1956, respondent abandoned use of the name "North American" and, without obtaining prior Board approval, commenced operations under the name "Trans American Airlines" (R. 57).[5] This action followed an injunction issued by the United States District Court for the Southern District of California in a private unfair competition suit brought by North American Aviation, Inc., an aircraft manufacturer, enjoining respondent and others from using any name which included the words "North American." *North American Aircoach Systems, Inc.* v. *North American Aviation, Inc.*, 231 F. 2d 205 (C. A. 9), certiorari denied, 351 U. S. 920.

Upon remand, the Court of Appeals held (R. 56) that the Board's finding that respondent's use of the name "North American" causes "substantial public confusion which is likely to continue" "is supported by the evidence" (R. 56). It accordingly affirmed so much of the Board's order as required respondent to cease and desist from engaging in air transportation under the names "North American Airlines, Inc.," "North American Airlines," or "North American" (R. 58). However, the court set aside the remainder of the order which forbade respondent's use in air transportation of any other name which includes the word "American," on the ground that "the evidence

[5] This name was taken from Trans American Airways, Inc., another corporate member of the North American Combine.

does not support the finding of the Board that the term 'American' had acquired a secondary meaning before [respondent] incorporated that term in its name or changed its corporate name, or the finding that such secondary meaning continues to exist" (R. 56, 57–58).

ARGUMENT

THE COURT BELOW, HAVING SUSTAINED THE BOARD'S FINDING THAT RESPONDENT'S USE OF THE TRADE NAME "NORTH AMERICAN" CAUSED SUBSTANTIAL PUBLIC CONFUSION, ERRED IN MODIFYING THE SCOPE OF THE BOARD'S ORDER

The Court of Appeals upheld, as supported by substantial evidence, the Board's finding that respondent's use of the name "North American" caused substantial public confusion, and it upheld the Board's order insofar as it ordered respondent to cease and desist from engaging in air transportation under that name. However, the court set aside that portion of the Board's order which prohibited respondent from using any other name which includes the word "American," on the ground that "the evidence does not support the finding of the Board that the term 'American' had acquired a secondary meaning before petitioner incorporated that term in its name or changed its corporate name" (R. 56). In thus modifying the order, however, the court misconceived the basis upon which the Board prohibited use of the word "American." That prohibition did not rest on the finding that the word had a secondary meaning, but on the Board's determination that the broad order was necessary to cure the statutory violations shown by the record.

The Board found that the similarity of the various "North American" names used by respondent and the names "American" and "American Airlines" used by petitioner had caused substantial public confusion between the carriers, and that such "confusion * * * is likely to continue" (R. 33). It concluded (R. 31–32) that "the public should be protected from the effects of the confusion * * * by eliminating what we find to be the cause of such confusion," namely, engaging in air transportation under the name "North American" or any other name which includes the word "American" (R. 33). While the Board did hold that the word "American" had acquired a secondary meaning denoting petitioner (R. 29), it expressly stated that even without such secondary meaning a cease-and-desist order nevertheless would issue, since

> [w]e do not believe that in a case like the present, secondary meaning must be proven in order to protect the public against a clearly demonstrated and substantial confusion. And this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name 'American Airlines'." [R. 30.]

This ruling was in accord with judicial decisions that under Section 5 of the Federal Trade Commission Act (15 U. S. C. 45), after which Section 411 of the Civil Aeronautics Act was fashioned (*American Airlines* v. *North American Airlines*, 351 U. S. 79, 82), a Commission cease-and-desist order directed against use of trade names which cause substantial public confusion does not require a finding of secondary

meaning. *Galter* v. *Federal Trade Commission*, 186 F. 2d 810 (C. A. 7); certiorari denied, 342 U. S. 818; *Juvenile Shoe Co.* v. *Federal Trade Commission*, 289 Fed. 57 (C. A. 9), certiorari denied, 263 U. S. 705; cf. *American Airlines* case, *supra*, at 85.

Since the Board's order prohibiting use of the name "American" did not rest on the finding that the word had a secondary meaning, the court's reversal of that finding did not justify modification of the order. On the contrary, in view of the court's affirmance of the Board's finding that there was substantial public confusion between the names "North American" and "American," the only issue with respect to the scope of the order was "to ascertain whether the Commission [Board] made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612.

The Board "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 613; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 428–430. And, "[i]n carrying out this function" of "prevent[ing] illegal practices in the future * * * the [Board] is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. * * * [I]t must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal*

Trade Commission v. *Ruberoid, supra; Federal Trade Commission* v. *National Lead Co., supra.*

Here, the Board found that respondent's trade name "North American" was so similar to petitioner's name "American" as to cause substantial public confusion in violation of Section 411. The order, by prohibiting respondent from using any name containing the word "American," was designed to eliminate "the cause of such confusion" (R. 32), namely, respondent's use of that word. Certainly the order has a "reasonable relation to the unlawful practices found to exist" (*Siegel, supra*); in fact, the order is directed at the very cause of such practices.

To limit the Board's order, as the Court of Appeals has done, to prohibiting use of the particular word combination "North American," would contravene the rule that the Board "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Ruberoid, supra; National Lead, supra*). That such a narrow order would not be "'adequate to cope with the unlawful practices' disclosed" (*Ruberoid, supra*) is borne out by the fact, that, during the pendency of this litigation, respondent changed its name from "North American" to "Trans American." Thus, although respondent's use of the word "American" was clearly the source of the confusion, the modification made by the court below would permit respondent, by the simple expedient of substituting one monosyllabic prefix for another, to continue using that very word. As this Court has pointed out (*Ruberoid, supra*) agen-

cies may make their orders sufficiently broad so that they "may not be [thus] by-passed with impunity."

CONCLUSION [6]

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals, insofar as it set aside part of the Board's order, should be reversed.

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DECEMBER 1957.

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[6] Because it seems clear that the decision below is substantively erroneous, we believe it unnecessary for the Court to reach, and the Government does not intimate any view upon, the first question specified in the petition for certiorari. That question is stated to be (Pet. 4) "whether the Court of Appeals, going beyond the purpose of this Court's remand, can review the scope of a remedial order where the respondent had made no objection thereto either before the Board or even before the Court of Appeals, thus defeating a limitation in the applicable statute [Section 1006 (e) of the Civil Aeronautics Act] which confines the reviewing court to the consideration of objections urged before the Board."